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IN THE COURT OF APPEALS OF INDIANA

RANDY VANARSDALE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 03A05-0607-CR-381
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT
The Honorable Roderick McGillivray, Judge
Cause No. 03D02-0308-FC-1094

April 30, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Randy VanArsdale appeals the revocation of his probation. We affirm.

Issues

We restate VanArsdale's issues as follows:

I. Whether the trial court committed reversible error in allowing someone other than VanArsdale's probation officer to testify regarding his probation record; and

II. Whether the trial court abused its discretion in revoking VanArsdale's probation.

Facts and Procedural History

The facts most favorable to the revocation indicate that on February 27, 2004, VanArsdale agreed to plead guilty to class C felony operating a vehicle after lifetime license forfeiture. Pursuant to the plea agreement, the trial court imposed an eight-year sentence, with all but two years suspended.

On February 6, 2006, VanArsdale's probation officer, G. Chip James, filed a petition to revoke probation that contains the following allegations:

> 2. The Defendant violated the terms of probation on or about 8/18/05 by committing the offense of Criminal Recklessness in Decatur County, IN ….
> 3. The Defendant violated the terms of probation on or about 10/12/05 by testing 0.041% on a Portable Breathalyzer at the Bartholomew County Probation Department.
> 4. The Defendant violated the terms of probation on or about 12/11/05 by committing the offense[s] of Operating a Motor Vehicle After Lifetime Suspension and Operating a Vehicle while Intoxicated in Decatur County, IN ….
> 5. The Defendant violated the terms of probation by failing to comply with programs and or counseling as recommended by Probation.

Appellant's App. at 30.

On June 19, 2006, the trial court held a probation violation hearing. At the conclusion of the hearing, the State conceded that it had not met its burden of proving the violation alleged in paragraph two of the petition. Thereafter, the trial court stated, "I will find that the defendant has violated the terms and conditions of his probation." Tr. at 30. The court then conducted a disposition hearing, at the conclusion of which it executed VanArsdale's suspended sentence. This appeal ensued.

Discussion and Decision

I. Admission of Testimony

James, VanArsdale's probation officer, did not testify at the violation hearing.[1] Instead, the State called probation officer Marcy Trisler to testify regarding VanArsdale's alleged violations. Defense counsel established that Trisler had reviewed VanArsdale's file but had never met with him and had not produced any of the materials in his file. Defense counsel then objected to Trisler "being able to testify as one on a lack of foundation and two based on she is not an adequate witness or is incompetent to testify on behalf of the probation department about the contents of that file." Tr. at 3. The trial court overruled the objection. Defense counsel renewed the objection several times during Trisler's testimony and was overruled each time. Subsequently, Greensburg Patrolman Jarod McCalvin and VanArsdale testified regarding the allegation in paragraph 4 of the probation violation notice, namely, that on December 11, 2005, VanArsdale violated his probation by committing the offenses of operating a motor vehicle after lifetime suspension and operating a motor vehicle while intoxicated.

On appeal, VanArsdale acknowledges that "because probation revocation procedures are to be flexible, strict rules of evidence do not apply." *Cox v. State*, 706 N.E.2d 547, 550 (Ind. 1999). In fact, as our supreme court noted in *Cox*, Indiana Evidence Rule 101(c)(2) states that the rules of evidence, other than those with respect to privileges, do not apply in probation proceedings. *Id*. The court went on to hold that in probation revocation hearings, "judges may consider any relevant evidence bearing some substantial indicia of reliability. This includes reliable hearsay." *Id*. at 551 (footnote omitted).

From this holding, VanArsdale attempts to bootstrap a requirement that a witness in a probation revocation proceeding have personal knowledge about the matter to which he or she is testifying pursuant to Evidence Rule 602, which, he says, "ensure[s] that a Defendant has the ability to confront and cross-examine his accusers, as afforded by the 14th Amendment of the United States Constitution." Appellant's Br. at 8.[2] To the extent VanArsdale challenges the trial court's admission of Trisler's testimony on due process and confrontation grounds, we note that he did not object on those grounds at the violation hearing and has therefore waived any such claims on appeal. *See Small v. State*, 736 N.E.2d 742, 747 (Ind. 2000) (holding that defendant waived confrontation claim by failing to object on that basis at trial: "A defendant may not raise one ground for objection at trial and argue a

[1] VanArsdale notes that the State offered no reason for James's absence.

[2] Evidence Rule 602 states in pertinent part, "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.… Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness."

different ground on appeal.").[3] Likewise, VanArsdale has waived any challenge to the reliability of the contents of his probation file.

By failing to make any objection below, VanArsdale has waived his claim that the trial court denied him due process at the violation hearing by "never specif[ying] what it was relying upon in determining that [he] violated the terms and conditions of his probation" or "which allegations in the Petition to Revoke Probation were proved or disproved." Appellant's Br. at 11. *See Bunting v. State*, 854 N.E.2d 921, 924 (Ind. Ct. App. 2006) ("A party may not sit idly by, permit the court to act in a claimed erroneous manner, and subsequently attempt to take advantage of the alleged error."), *trans. denied*. The State acknowledges that, "[w]aiver aside, due process usually requires a written statement by the fact finder regarding the evidence relied upon and the reasons for revoking probation." Appellee's Br. at 6 n.1 (citing *Hubbard v. State*, 683 N.E.2d 618, 620-21 (Ind. Ct. App. 1997)). The trial court's written order does not contain such a statement. Appellant's App. at 17. Nevertheless, it is reasonable to conclude, as the State suggests, that the trial court found that VanArsdale "committed each of the alleged violations, except the criminal recklessness allegation which had been conceded by the State." Appellee's Br. at 6 n.1.

Finally, to the extent VanArsdale challenges the admissibility of Trisler's testimony based on her lack of personal knowledge regarding the contents of his probation file, we must reject his contention that Evidence Rule 602 applies in probation revocation proceedings, given that our supreme court has thus far not disavowed its holding in *Cox* or amended

[3] Consequently, we need not address VanArsdale's reliance on *Reyes v. State*, 853 N.E.2d 1278 (Ind. Ct. App. 2006), *trans. granted*, which has been vacated by our supreme court.

Evidence Rule 101(c) accordingly. *See Henderson v. State*, 825 N.E.2d 983, 987 n.3 (Ind. Ct. App. 2005) (stating that the Court of Appeals is bound by Indiana Supreme Court precedent), *trans. denied*.

If the trial court committed any procedural error with respect to admitting Trisler's testimony or failing to enter specific findings regarding its revocation of VanArsdale's probation, we conclude that such error was harmless in light of competent testimony—including VanArsdale's—that he violated at least one condition of his probation. *See Pitman v. State*, 749 N.E.2d 557, 559 (Ind. Ct. App. 2001) (stating that an alleged probation violation "need be proven only by a preponderance of the evidence" and that "violation of a single condition of probation is sufficient to revoke probation."), *trans. denied*; *see also Cox*, 706 N.E.2d at 551 ("If there is substantial evidence of probative value to support the trial court's conclusion that a defendant has violated any terms of probation, we will affirm its decision to revoke probation."). We address that violation more fully below.

II. Revocation of Probation

Patrolman McCalvin testified that on December 11, 2005, he saw VanArsdale driving a vehicle and determined that he was a habitual traffic violator with a lifetime license suspension. VanArsdale drove into a parking lot, and Officer McCalvin pulled up behind him. VanArsdale exited his vehicle and approached Officer McCalvin, who detected an odor of alcoholic beverage and noticed that VanArsdale's eyes were bloodshot. Officer McCalvin administered a portable breath test that registered a blood alcohol level of 0.19%. Officer McCalvin arrested VanArsdale for operating a motor vehicle after lifetime suspension and

operating a vehicle while intoxicated. The case was later dismissed pursuant to a plea agreement.

VanArsdale testified that after being summoned to his father-in-law's house late at night, he drove there and found his father-in-law "laying in a puddle of blood[.]" Tr. at 25. VanArsdale "got him cleaned up[,]" called an ambulance, "[took] a drink[,]" and was driving home when he encountered Officer McCalvin.

> Under Indiana Code § 9-30-10-18, an individual charged with driving while suspended has as a defense "that the operation of a motor vehicle was necessary to save life or limb in an extreme emergency." Section 9-30-10-18 further provides that "the defendant must bear the burden of proof by a preponderance of the evidence to establish this defense."

Cain v. State, 844 N.E.2d 1063, 1065-66 (Ind. Ct. App. 2006). Clearly, any "extreme emergency" had passed by the time VanArsdale took a drink and set off for home. At the very least, the foregoing testimony establishes by a preponderance of the evidence that VanArsdale operated a motor vehicle after lifetime suspension in violation of his probation.

"The ability to serve a sentence on probation has been described as a 'matter of grace' and a 'conditional liberty that is a favor, not a right.'" *Rosa v. State*, 832 N.E.2d 1119, 1121 (Ind. Ct. App. 2005) (citations omitted). We review the trial court's decision to revoke probation for an abuse of discretion. *Id*. "An abuse of discretion occurs if the decision is against the logic and effect of the facts and circumstances before the court. If the trial court finds the person violated a condition of probation, it may order execution of any part of the sentence that was suspended at the time of initial sentencing. The violation of a single condition of probation is sufficient to permit a trial court to revoke probation." *Id*. (citations omitted).

"In making the determination of whether the violation warrants revocation, the probationer must be given an opportunity to present evidence that explains and mitigates his violation." *Cox v. State*, 850 N.E.2d 485, 488 (Ind. Ct. App. 2006). To support his argument that the trial court abused its discretion in revoking his probation, VanArsdale merely reiterates the mitigating evidence he presented at the violation hearing and invites us to "remand with instructions to the Trial Court to reconsider the disposition and enter a new sentencing statement." Appellant's Br. at 13.[4] Based on the undisputed testimony regarding VanArsdale's probation violation, we decline his invitation and affirm the trial court's revocation of his probation.

Affirmed.

SULLIVAN, J., and SHARPNACK, J., concur.

[4] VanArsdale contends that "the violation was the result of circumstances unlikely to recur." Appellant's Br. at 13. The fact that VanArsdale is a habitual traffic violator strongly suggests otherwise.